

Compensation for Negligently Shortened Life Expectancy

Gloria Belgrad

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Torts Commons](#)

Recommended Citation

Gloria Belgrad, *Compensation for Negligently Shortened Life Expectancy*, 29 Md. L. Rev. 24 (1969)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol29/iss1/5>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Notes and Comments

COMPENSATION FOR NEGLIGENTLY SHORTENED LIFE EXPECTANCY

In a civil suit for negligently inflicted personal injuries "[t]he cardinal principle of damages in Anglo-American law"¹ is that of *compensation* of the plaintiff for his injuries. While courts and juries in assessing damages are undoubtedly influenced in varying degrees by the extent of a defendant's culpability, the theoretical *purpose* of an award of damages is to make the plaintiff as nearly whole as possible by an award of money — to place him in the position he occupied before the accident. Thus, if the defendant has negligently caused the loss of plaintiff's arm, the law will ideally seek to compensate the plaintiff for his costs of medical care and rehabilitation, his lost earnings, his physical pain, and any severe mental suffering caused by the injury.

Consider, however, the possibility that, as a result of the injury and the attendant physical and emotional stress, the victim's life expectancy has been shortened by five years. Progress in the medical and actuarial sciences renders expert testimony to this effect increasingly more accurate and available. Will damages be awarded to compensate for this loss? The answer, surprisingly, is not dictated by the doctrine of proximate cause, as might be expected. In fact, the question is not properly raised until *after* the evidence has satisfactorily demonstrated that the curtailment of the plaintiff's normal life expectancy *was* proximately caused by the defendant's negligence. Will the jury be instructed to make an award for the lost expectancy irrespective of any pecuniary losses sustained thereby and regardless of any increase in the burden of mental suffering occasioned by knowledge of premature death? The courts of England have said *yes*; the courts in this country have consistently said *no*.

THE BRITISH CASES

In the 1808 case of *Baker v. Bolton*,² Lord Ellenborough, whose forte, according to Prosser, was never common sense,³ stated by way of dictum that "in a civil Court, the death of a human being could not be complained of as an injury. . . ."⁴ Enshrined in the common law by virtue of a misapplication of the doctrine of *stare decisis*,⁵ this offhand remark effectively rendered it cheaper for a wrong-doer to kill his victim than to maim him, since no damages were recoverable by the bereaved family.⁶ This absurd and intolerable situation was remedied in England by the passage of the Fatal Accidents Act of

1. 2 F. HARPER & F. JAMES, TORTS § 25.1, at 1299 (1956).

2. 170 Eng. Rep. 1033 (K.B. 1808). See also *Higgins v. Butcher*, 123 Eng. Rep. 756 (Com. Pl. 1607).

3. W. PROSSER, TORTS § 121, at 924 (3d ed. 1964).

4. 170 Eng. Rep. at 1033.

5. See, e.g., *Admiralty Comm'rs v. S.S. Americka*, [1917] A.C. 38.

6. See W. PROSSER, TORTS § 121, at 923 (3d ed. 1964).

1846,⁷ known as Lord Campbell's Act, the prototype of many American wrongful death statutes. The Act created a new cause of action in favor of dependents of the deceased for any pecuniary losses suffered as a result of his death. In 1934, the Law Reform (Miscellaneous Provisions) Act⁸ expanded the remedies available upon death by providing that any cause of action which had been vested in the deceased prior to his death was to survive for the benefit of his estate. Though apparently thus dispatched by Parliament, Lord Ellenborough's dictum continued to cast its shadow over an area in the law where its application made even less sense than in its original context — the problem of the living plaintiff with a tortiously diminished life span.⁹

Logically, to reduce a man's life span is merely to accelerate the moment of his death.¹⁰ No man, in the nature of things, can have a cause of action for his own death. Even where such a cause of action is given by statute to his dependents, the damages awarded are not for loss of life but for pecuniary losses sustained by them by virtue of his death. Therefore, the argument runs, to award the living plaintiff damages for loss of expectation of life is to give "to the shortening of life an efficacy which is denied to its extinction, and to death in the future an efficacy which is denied to death on the instant."¹¹ This theory was argued in the famous case of *Flint v. Lovell*,¹² in which a prosperous, vigorous man of seventy, with a normal life expectancy of eight to ten years, was severely injured by the defendant's automobile and reduced to "... a precarious tenure not likely to exceed twelve months. . . ."¹³ In the House of Lords, the argument against recovery was flatly rejected as having no bearing on a case in which the plaintiff is still alive at the date of the trial, and an award of £4000 for the loss was upheld.

Although there were earlier decisions in which awards were given for curtailment of life expectancy,¹⁴ *Flint* is almost universally regarded as the landmark case on the subject since it explicitly held, for the first time, that such a cause of action could be maintained. Yet *Flint* merely opened a Pandora's box of perplexing questions which were to bedevil the English bench and bar. It was indisputable that the House of Lords had upheld a substantial award to Mr. Flint for something which had to do with his loss of "the prospect of an enjoy-

7. 9 & 10 Vict., c. 93.

8. 24 & 25 Geo. 5, c. 41.

9. See Smith, *Psychic Interest in Continuation of One's Own Life: Legal Recognition and Protection*, 98 U. PA. L. REV. 781 (1950), for a discussion of the "irrelevance of the common-law rules concerning the jural effects of death" to the current topic of shortening of life.

10. See *Farrington v. Stoddard*, 115 F.2d 96, 100 (1st Cir. 1940).

11. *Flint v. Lovell*, [1935] 1 K.B. 354, 367.

12. [1935] 1 K.B. 354, noted in 51 L.Q. REV. 268 (1935). See Annot., 97 A.L.R. 823 (1935); Annot., 131 A.L.R. 1351 (1941); Hannigan, *Recent English Decisions in Damages for Injuries Resulting in Premature Death*, 18 B.U.L. REV. 275 (1938).

13. [1935] 1 K.B. at 359.

14. See, e.g., *Reid v. Lanarkshire Traction Co.*, [1934] Sess. Cas. 79, [1934] Scots L.T.R. 54; *McGarry v. Canada West Coal Co.*, 2 Alta. 229 (1909). One often finds the case of *Phillips v. London & South Western Ry.*, 5 Q.B.D. 78 (1879), cited as the earliest English case permitting independent recovery for shortening of life. However, a close reading of the case seems to indicate that the court discussed "the prospect of a speedy death" only in the context of the mental suffering occasioned by the injury.

able . . . old age,"¹⁵ but it was far from clear just what this "something" for which compensation had been given really was. Was the "amputation of life substance"¹⁶ an *absolute* loss to be compensated in the same manner as loss of a limb? Or were the damages awarded in the nature of a *solatium* to the stricken plaintiff for the increased burden of mental anguish which knowledge of his premature death would naturally produce?

In *Slater v. Spreag*,¹⁷ the latter rationale was adopted. In that case, the victim of a motor accident died two days later without having regained consciousness. The court refused to award damages for shortening of life, explaining that such damages could be awarded only if the plaintiff were aware of his loss. The court concluded, therefore: "If a man does not retain consciousness, I do not think that any damages for the shortening of life can be awarded."¹⁸ This interpretation suffers from a double handicap. Theoretically, it could be argued through an extension of this rationale that of two men deprived of an equal span of life, one comatose, the other alert, the latter, by being forced to endure an awareness of his loss, had sustained the greater injury, and was, therefore, entitled to the greater compensation. This argument, however forceful theoretically, is met with an almost visceral opposition, an uneasy feeling that it simply isn't fair to permit a wrongdoer to escape with lighter damages because, fortuitously, he had rendered his victim senseless. In *Rose v. Ford*,¹⁹ the argument proved too unpalatable for the House of Lords. A twenty-three year old woman, struck by the defendant's car, remained in a coma for four days before she died. Her father, as administrator, brought an action under both the Fatal Accidents Act and the Law Reform Act of 1934. The trial judge refused to allow damages for loss of expectation of life on the grounds that no mental suffering had been caused thereby. The Court of Appeals and the House of Lords agreed that this approach was wrong. The loss sustained by the deceased was deemed to be in the nature of an absolute loss. A claim for damages had vested in her prior to her death, and, under the Act of 1934, passed to her personal representative. In upholding an award of £1000 suggested as appropriate by the Court of Appeals, Lord Wright expressed his "feelings" on the matter in this way:

[A] man has a legal right in his own life. I think he has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts, not only in regard to pain, suffering, and disability, but also in regard to the continuance of life for its normal expectancy. A man has a legal right that his life should not be shortened by the tortious act of another. His

15. [1935] 1 K.B. at 355. As a matter of fact, Mr. Flint was apparently still alive three years later, as a discussion between counsel and the court disclosed in *Morgan v. Scoulding*, [1938] 1 K.B. 786, 789.

16. Smith, *Psychic Interest In Continuation of One's Own Life: Legal Recognition and Protection*, 98 U. PA. L. REV. 781 n.1 (1950).

17. [1936] 1 K.B. 83.

18. *Id.* at 89.

19. [1937] A.C. 826, noted in 49 HARV. L. REV. 482 (1936).

normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given.²⁰

The *Slater* rationale was also open to the practical objection that it interfered with the even-handed distribution of justice; it operated as a bar to the recovery of a wide variety of plaintiffs who, by force of circumstances, were not fully aware of their loss, yet permitted recovery in other cases of no greater discernible merit. By holding as it did in *Rose v. Ford*, the House of Lords opened the way for recovery not merely by comatose victims, but also by children too young to appreciate the fear of impending death,²¹ by those victims who were killed instantaneously,²² by those rendered insane as a result of the injuries sustained in the accident,²³ and by those adults from whom the truth about their condition was withheld by family and physicians.²⁴ So completely had the theory of "objective" loss triumphed that in 1939, in *Ellis v. Raine*,²⁵ a new trial was ordered when the jury, disregarding the instructions of the trial judge, failed to award any damages for loss of life expectancy.

Having come this far, after determining that an action for the loss of life was not precluded by *Baker v. Bolton*,²⁶ and that the loss was to be compensated *per se*, regardless of the victim's state of mind, the courts were confronted with the most baffling, yet most crucial problem of all — that of the proper measure of damages to be awarded in any given case. It requires no particular philosophical insight to appreciate what an awesome task it is to affix a price tag to a human life. At worst, there is something vaguely obscene about the attempt, something redolent of the slave markets of yesteryear. At best, it is a subject more fit ". . . for discussion in an essay on Aristotelian ethics than in . . . a Court of law."²⁷ However, as Lord Wright stated simply in *Rose v. Ford*: "[I]t is the best the law can do. It would be paradoxical if the law refused to give any compensation at all, because none could be adequate."²⁸

Bemused judges, aware that no precise formula for admeasurement could be devised, yet committed to the making of the calculation, submitted the issue to juries with a minimum of analysis and a mild

20. [1937] A.C. at 847-48.

21. See, e.g., *Trubyfield v. Great Western Ry.*, [1937] 4 All E.R. 614 (K.B.) (8 year old); *Shepherd v. Hunter*, [1938] 2 All E.R. 587 (C.A.) (3 year old); *Baily v. Howard*, [1939] 1 K.B. 453 (3 year old).

22. See, e.g., *Morgan v. Scoulding*, [1938] 1 K.B. 786 (23 year old killed instantaneously, yet cause of action vested in decedent during instant between impact and death so as to survive to his estate).

23. See, e.g., *Roach v. Yates*, [1938] 1 K.B. 256 (33 year old bricklayer rendered totally helpless for life as a result of accident, suffering from traumatic dementia, traumatic epilepsy, incontinence, impotence, headaches, giddiness, excessive thirst, fibrosis of the lung and weakness of legs).

24. Lord Wright referred to such a victim, whose cancer condition was aggravated by the accident, in his remarks in *Rose v. Ford*, [1937] A.C. 826, 849.

25. [1939] 2 K.B. 180.

26. 170 Eng. Rep. 1033 (K.B. 1808). See note 2 *supra*.

27. *Benham v. Gambling*, [1941] A.C. 157, 166 (Viscount Simon).

28. [1937] A.C. at 848.

exhortation to be dispassionate and conservative in their estimates.²⁹ However, awards fluctuated so wildly in amount³⁰ that it became obvious that "juries [were] not all acting on the same principles."³¹ Once again, the difficulty centered on the question of exactly what it was that the jury was expected to quantify. Was it the victim's subjective evaluation of the worth of his own life? Did "Diogenes [have] the same claim to be indemnified for the loss of the good things of this earth which he despised as . . . Alexander who valued them highly?"³² Was the loss more grievous to the rich than to the poor, to the healthy than to the infirm, or was the jury by "necromancy and crystal-gazing . . . sanctioned in the law . . . [to] forecast one's future state of happiness"³³ based on its own objective estimate of the victim's prospects? Was it the actual number of the lost years which was to be compensated or their content, whether objectively or subjectively appraised? Were damages to be strictly proportionate to the temporal dimensions of the loss so that, a priori, the younger the victim, the more generous the award,³⁴ or were the greater uncertainties attendant upon the future of a very young child to exert a countervailing influence?³⁵

In *Benham v. Gambling*,³⁶ the House of Lords had before it a claim by the administrator of a two and one-half year old child who,

29. See, e.g., remarks of Scott, L.J., in *Baily v. Howard*, [1939] 1 K.B. 453, 458-59: . . . I see no means of arriving at any sort of quantitative scale for the guidance of judges or juries except the gradual working out, chiefly through the common sense of juries, of the sort of figures that in English civilization of to-day are to be regarded as reasonable. . . . [T]he amount to be given should always be strictly reasonable, and, if it errs at all, should err on the low side.

This appeal to the common sense of the jury has been likened to "the imprecation of a divinity by a magician in despair." Kahn-Freund, *Expectation of Happiness*, 5 MOD. L. REV. 81, 88 (1941).

30. Cf. *Flint v. Lovell*, [1935] 1 K.B. 354 (70 year old man — £4000); *Feay v. Barnwell*, [1938] 1 All E.R. 31 (K.B.) (71 year old woman — £600); *Morgan v. Scoulding*, [1938] 1 K.B. 786 (23 year old man — £1000); *Shepherd v. Hunter*, [1938] 2 All E.R. 587 (C.A.) (3 year old child — £90). See also Note, *Damages for Loss of Life Expectancy*, 33 ILL. L. REV. 967 (1939).

31. *Ellis v. Raine*, [1939] 2 K.B. 180, 184: "[I]t is quite clear that juries are not all acting on the same principles, and it may be that ultimately Parliament will have to intervene. . . ."

32. Kahn-Freund, *Expectation of Happiness*, 5 MOD. L. REV. 81, 86 (1941).

33. Comment, *Damages for Shortened Life*, 10 FORD. L. REV. 219, 228, 229 (1941).

34. In *The Aizkarai Mendi*, [1938] P. 263, the registrar below gave £150 to the representatives of each of several seamen killed at sea, without regard to the age of the deceased. On appeal, Langton J., stated: "I cannot bring myself to believe that in any question of expectation of life the factor of age can be entirely negligible. I appreciate fully that this age or time factor is not to be handled arithmetically. . . . Nevertheless, the very notion of expectation seems to me to connote time. . . ." *Id.* at 276. He then divided the claims into 3 age groups: 23-26, 35-37, 41-44, awarding them respectively £400, £350, and £300. See also Note, *Measure of Damages in Fatal Accidents*, 13 MOD. L. REV. 508 (1950).

35. See, e.g., *Trubyfield v. Great Western Ry.*, [1937] 4 All E.R. 614, 616 (K.B.): [I]n the case of a very young infant, it must be that the calculation of the exigencies and incidents of life would materially decrease the amount that would be given, whereas, in the case of an infant who has outlived the dangers of childish ailments . . . it may very well be that that child's outlook has been clarified, and therefore it may look upon an entirely unclouded vista of life. . . . I cannot imagine that the years of childhood and adolescence . . . are purely a debit. See also *Shepherd v. Hunter*, [1938] 2 All E.R. 587 (C.A.).

36. [1941] A.C. 157.

after an accident, died without regaining consciousness. That Chamber strove mightily to furnish some rational guidelines for future ventures into this most bewildering corner of the law. It was primarily concerned with establishing that, henceforth, awards of damages be governed by "... a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy."³⁷ To this end, the strictly actuarial test was to be avoided, since "... the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life."³⁸ The jury was to disregard the subjective views of the victim and make its own "... objective estimate of what kind of future on earth the victim might have enjoyed, whether he has justly estimated that future or not."³⁹ Yet, in forming this objective estimate, the jury was not to be swayed by the individual's social position or financial worth since these furnished no sure indicia of happiness and since "damages [were] in respect of loss of life, not of loss of future pecuniary prospects."⁴⁰ Where the case involved an infant who had not "passed the risks and uncertainties of childhood,"⁴¹ a smaller award was called for than in the case of an adult who had "in some degree attained to an established character and to firmer hopes."⁴² In this "linguistic alembic by a process almost alchemical,"⁴³ the Lords arrived at the sum of £200 as the proper figure to which the administrator was entitled.

Benham is most frequently cited, not for the guidelines which it sought to provide, but for the ceiling which it effectively clamped on the awards for this category of damages. It is viewed as an admission of defeat by the House of Lords, an attempt to emasculate a rule which, though grown totally ungovernable, it was powerless to overthrow.⁴⁴ Thereafter, the compensation of loss of life expectancy degenerated into a system of nominal awards, almost always pegged to the magic figure of £500, the depreciation in the value of the pound notwithstanding.⁴⁵ A wry footnote to this peculiar experiment in the law is to be found in the recently-voiced hope of Lord Devlin that Parliament would come to the rescue of the judiciary by enacting a

37. *Id.* at 168.

38. *Id.* at 166.

39. *Id.* at 167.

40. *Id.*

41. *Id.*

42. *Id.*

43. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 226 (1953).

44. The House of Lords never reverses itself or overrules precedents. See Kahn-Freund, *Expectation of Happiness*, 5 MOD. L. REV. 81 (1941).

45. See *Yorkshire Electricity Bd. v. Naylor*, [1967] 2 All E.R. 1 (H.L.). In reinstating the £500 verdict of the trial judge, which had been raised to £1000 by the Court of Appeal, Lord Devlin stated:

[£200] has been taken as if, subject to the change in the value of money, it had been fixed by statute in 1941; and indeed the decision in *Benham v. Gambling* has been described as "judicial legislation." The current figure, which in fact the judge awarded in this case, is £500 and the evidence at the trial showed that this was almost exactly the equivalent of £200 in 1941.

Id. at 11.

sliding scale of awards⁴⁶ akin to those found in workmen's compensation legislation.

THE AMERICAN CASES

The courts of this country have, for a variety of reasons, never explicitly recognized loss of life expectancy as an independent item of recoverable damages.⁴⁷ In the earlier cases, the claim for compensation was rejected either because the court misconceived the proper application of the rule of *Baker v. Bolton*,⁴⁸ because of a misplaced delicacy which caused a recoil from the task as from something verging on blasphemy,⁴⁹ or because of an uncritical adherence to earlier precedents.⁵⁰ A little later, three main lines of judicial objection were opened up and expanded: fear of speculative awards,⁵¹ fear of duplication of damages,⁵² and fear of becoming involved in the experiment which had failed so palpably in the courts of England.⁵³

46. See *Yorkshire Electricity Bd. v. Naylor*, [1967] 2 All E.R. 1, 12 (H.L.), commented on in 83 L.Q. Rev. 326 (1967):

It would, I think, be a great improvement if this head of damage was abolished and replaced by a short Act of Parliament fixing a suitable sum which a wrongdoer whose act has caused death should pay into the estate of the deceased. While the law remains as it is, I think that it is less likely to fall into disrespect if judges treat *Benham v. Gambling* as an injunction to stick to a fixed standard than if they start revaluing happiness, each according to his own ideas.

47. In *Sox v. United States*, 187 F. Supp. 465 (E.D.S.C. 1960), damages were sought for pre-natal injuries which rendered the plaintiff totally dependent for life. The court stated: "The measure of damages in this case seems to be embraced within three general elements: (a) compensation for the injury and resulting impairment of mind and body, (b) compensation for the cost of care . . . and (c) deprivation of normal life expectancy." *Id.* at 469. However, in awarding damages of \$260,000, the court made no breakdown of the figures, so that it is not clear how much, if anything, was awarded for shortening of life.

48. See note 2 *supra* and accompanying text. *E.g.*, *Richmond Gas Co. v. Baker*, 146 Ind. 600, 45 N.E. 1049, 1052 (1897), in which the defense argued the *Baker v. Bolton* rule. The court stated: "[I]f the condition of the injured person is such that a shortening of life may be apprehended, this may be considered, in determining the extent of the injury. . . . This, however, falls far short of authorizing damages for the loss or shortening of life itself. The value of human life cannot, as adjudged by the common law, be measured in money." See also 12 N.Y.U.L.Q. Rev. 535 (1935).

49. See *Richmond Gas Co. v. Baker*, 146 Ind. 600, 45 N.E. 1049, 1052 (1897): "It is, besides, inconceivable that one could thus be compensated for the loss or shortening of his own life." Compare the impassioned words of the court in *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118, 122 (1960):

We are aware, of course, that there are those who say that the life of a human being is impossible to value, that although we will grapple mightily with the value of the life of a horse, of a team of mules, we will stand aloof where a human is concerned and assign it no value whatever. This kind of delicacy would prevent the distribution of food to the starving because the sight of hunger is so sickening. But we cannot shirk this difficult problem of valuation.

50. For the pervasive influence of *Richmond Gas Co. v. Baker*, 146 Ind. 600, 45 N.E. 1049 (1897), see, *e.g.*, *Lake Erie & W.R.R. v. Johnson*, 191 Ind. 479, 133 N.E. 732 (1922); *Cleveland, C. C. & St. L. Ry. v. Miller*, 165 Ind. 381, 74 N.E. 509 (1905); *Muncie Pulp Co. v. Hacker*, 37 Ind. App. 194, 76 N.E. 770 (1906).

51. See, *e.g.*, *Ham v. Maine-New Hampshire Interstate Bridge Authority*, 92 N.H. 268, 30 A.2d 1, 6 (1943): "To allow for the enjoyment of continued life would mean an entrance into a boundless field of arbitrary assessment, for which no policy of the laws exists."

52. See, *e.g.*, *O'Leary v. United States Lines Co.*, 111 F. Supp. 745, 747 (D. Mass. 1953): ("[R]ecovery would be based on the degree of damage not on the degree of fault, and would presumably usually involve some financial duplication"); *Rhone v. Fisher*, 224 Md. 223, 167 A.2d 773 (1961).

53. See, *e.g.*, *Rhone v. Fisher*, 224 Md. 223, 229, 167 A.2d 773, 777 (1961): "The experience of the English courts with the rule and the virtual emasculation thereof

Of the three, it is the pervasive fear of speculation on the part of the jury which is the most difficult to fathom. The standard of certainty pursued in the area of contract damages has but doubtful application in the field of tort claims for personal injuries.⁵⁴ We have long since outgrown the atavistic notion that the law can be concerned only with the compensation of tangible or pecuniary losses.⁵⁵ We have come a long way toward the protection of the intangible interests of personality.⁵⁶ "[T]hough the premise may elude detection, some deep intuition may claim to validate this process of evaluating the imponderable. . . . Because our society sets a high value on money it uses money or price as a means of recognizing the worth of non-economic as well as economic goods."⁵⁷ Juries are every day being called upon to perform feats of speculation similar to those which are apparently so dreaded in this area; courts across the country consistently uphold jury awards for such incommensurable elements of damage as physical pain and mental anguish, which is properly classifiable as a species of physical pain,⁵⁸ mental suffering due to fear that an unborn baby has been deformed as a result of the mother's injuries,⁵⁹ loss of fecundity,⁶⁰ impotence,⁶¹ loss of consortium,⁶² disfigurement,⁶³ premature aging,⁶⁴

which has evolved from that experience, as well as the rather ephemeral considerations which must be taken into account under it, and also the possible duplication or overlapping of compensation . . . do not commend the English Rule to us as one for adoption in this State."

54. See C. McCORMICK, *DAMAGES* § 32, at 124 (1935): "In the tort field, [the standard of certainty] has in fact no application at all to the measurement of damages to interests of personality, such as claims for pain, mental anguish, or humiliation, nor, of course, to punitive damages."

55. See, e.g., *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 P. 206, 209 (1903): "The law ought not to grant redress alone to the businessman who sustains commercial damage, and refuse redress to others who have sustained a more poignant infliction." See also *Deems v. Western Maryland Ry.*, 247 Md. 95, 231 A.2d 514 (1967), noted in 27 Md. L. Rev. 403 (1967); *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960); *Lockhart v. Besel*, 71 Wash. 2d 112, 426 P.2d 605 (1967).

56. Compare Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915), with Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219 (1953).

57. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 224 (1953).

58. See, e.g., *Dagnello v. Long Island R.R.*, 289 F.2d 797 (2d Cir. 1961) (jury award of \$130,000, \$97,000 of which was compensation for pain and suffering and loss of limb); *Corcoran v. McNeal*, 400 Pa. 14, 161 A.2d 367 (1960) (\$15,000 for pain, suffering and inconvenience). See also C. McCORMICK, *DAMAGES* § 88, at 316 (1935), where the author distinguishes between "mental distress which is the accompanying shadow of physical pain" and other forms of mental suffering such as "terror at the time of the injury."

59. See, e.g., *Occhipinti v. Rheem Mfg. Co.*, 252 Miss. 172, 172 So. 2d 186 (1965).

60. See, e.g., *Potts v. Guthrie*, 282 Pa. 200, 127 A. 605 (1925).

61. See, e.g., *Delaney v. New York Cent. R.R.*, 68 F. Supp. 70 (S.D.N.Y. 1946); *Sullivan v. City & County of San Francisco*, 95 Cal. App. 2d 745, 214 P.2d 82 (1950); *Walton v. United States Steel Corp.*, 362 S.W.2d 617 (Mo. 1962).

62. See, e.g., *Price v. H.B. Green Transp. Line*, 287 F.2d 363 (7th Cir. 1961); *Deems v. Western Maryland Ry.*, 247 Md. 95, 231 A.2d 514 (1967), noted in 27 Md. L. Rev. 403 (1967).

63. See, e.g., *Gray v. Washington Power Co.*, 30 Wash. 665, 71 P. 206 (1903).

64. See, e.g., *Corcoran v. McNeal*, 400 Pa. 14, 161 A.2d 367 (1960).

change of personality,⁶⁵ and despair at the realization of diminished capacity to labor.⁶⁶

Of even greater relevance, however, is a line of cases, involving permanent injuries, in which compensation has been accorded for "loss of enjoyment of life."⁶⁷ The phrase "loss of enjoyment of life" is strongly evocative of the British term "prospect of a predominantly happy life" and, indeed, the difference between the two is very slight, if not illusory. In the claim for "loss of enjoyment," damages are sought for the qualitative impairment, the narrowing, of the type of life the plaintiff might have expected to lead but for the accident. For example, in *Haynes v. Waterville & Oakland Street Railway*,⁶⁸ the court said: "The total loss of the left hand by a boy 10 years of age takes a great deal of usefulness and enjoyment out of his prospective life. The loss of earning power is by no means the extent of the injury."⁶⁹ In these cases, it is not the loss of one or two "measurable components" for which recovery is sought, such as the inability to dance or bowl, although such elements are presented to the jury in an attempt to provide some kind of anchor for its deliberations; rather, recovery is sought on account of the general limiting of horizons, for experiences never to be had, for the compression of plaintiff's life into a narrower channel than it might naturally have taken. As if to underscore this distinction, the majority of the court in *Hogan v. Santa Fe Trail Transportation Co.*⁷⁰ refused to allow damages to an accomplished violinist for loss of enjoyment from inability to play the violin following injury to her hand. The dissent, however, refused to acknowledge the distinction:

The great majority of courts, and in my opinion on sounder reasoning, have generally allowed recovery for "loss of enjoyment," or "loss of enjoyment of life." Obviously, if recovery may be had for injury which results generally in the loss of the enjoyment of life, then recovery cannot be withheld where compensation is sought for only one of such enjoyments as in the instant case.⁷¹

In the "loss of enjoyment" cases, no evidence is adduced to prove curtailment of the span of life and none is in fact claimed. In award-

65. See, e.g., *Wright v. Charles Pfizer & Co.*, 253 F. Supp. 811 (D.S.C. 1966); *Delaney v. New York Cent. R.R.*, 68 F. Supp. 70 (S.D.N.Y. 1946); *Fjellman v. Weller*, 213 Minn. 457, 7 N.W.2d 521 (1943).

66. See, e.g., *Rome Ry. & Light Co. v. Duke*, 26 Ga. App. 52, 105 S.E. 386 (1920).

67. See, e.g., *Kasiski v. Central Power & Light Co.*, 4 N.J. Misc. 130, 132 A. 201 (Super. Ct. 1926); *Bassett v. Milwaukee, Northern Ry.*, 169 Wis. 152, 170 N.W. 944 (1919). But see *King's Indiana Billiard Co. v. Winters*, 123 Ind. App. 110, 106 N.E.2d 713 (1952); *Indianapolis St. Ry. v. Ray*, 167 Ind. 236, 78 N.E. 978 (1906); *Town of Bellevue v. England*, 118 S.W. 994 (Ky. 1909). See also Annot., 120 A.L.R. 535 (1939); Smith, *Psychic Interest in Continuation of One's Own Life: Legal Recognition and Protection*, 98 U. PA. L. REV. 781, 789 (1950): "To assess the dimensions of interests of personality we are bound by common sense to multiply the breadth of life by its length."

68. 101 Me. 335, 64 A. 614 (1906).

69. 64 A. at 615.

70. 148 Kan. 720, 85 P.2d 28 (1938).

71. 85 P.2d at 36.

ing damages, however, the jury is at least implicitly aware that it must compensate a loss which will continue for the rest of the plaintiff's life, so that there is, subliminally at least, a time factor involved in its calculations. In practice, this time factor is revealed to the jury by the instructions of the court. From the language of the decisions, it is not altogether clear whether "loss of enjoyment" has been compensated independently, or as an attribute of mental suffering.⁷² If it has been compensated independently, then the case for independent recognition of loss of life expectancy is significantly strengthened, since, arguably, loss of life expectancy damages are merely loss of enjoyment damages awarded for a longer period of time. Assuming that loss of enjoyment is an element of mental suffering, as appears more likely, the court will instruct the jury to award damages on the basis of the plaintiff's life expectancy at the time of the trial, not at the time of the injury.⁷³ The theory, if not the practice, of the law here is strictly compensatory, not punitive. Recovery is permitted only for such mental suffering or loss of enjoyment as the plaintiff will actually experience. Thus, if this *were* a case involving evidence of diminution of life span, no damages could be had for the suffering which would have been experienced in the years never to be lived.

By contrast, in the English cases, the time factor is from the outset, as it were, made the star of the piece. The claim is, nominally, not for the narrowing of life, but for its shortening. Yet, as we have seen, by the time the issue is submitted to the jury, the significance of the actual number of years lost is muted. The jury is to shun the actuarial test; the thing to be valued is not the "prospect of length of days" but the "prospect of a predominantly happy life." The result is, as one critic has aptly observed, that the term "expectation of life," as used to describe these cases, is grossly misleading.⁷⁴ What the jury is actually being asked to appraise is the loss of "expectation of happiness."

From even this brief comparison, it should be apparent that American juries have long been doing precisely the same job as their English counterparts, and precisely that from which wary judges have sought to insulate them — a thorough-going job of speculation about

72. In *Delaney v. New York Cent. R.R.*, 68 F. Supp. 70, 74 (S.D.N.Y. 1946), the court, in listing the various elements of compensable damage which the jury had considered, mentioned *both* the loss of the ability to "enjoy a normal life" and the "mental anguish" endured in the past and likely to be endured in the future. However, in *Indianapolis St. Ry. v. Ray*, 167 Ind. 236, 78 N.E. 978, 980 (1906), the court reversed a judgment for the plaintiff because the trial judge's charge erroneously led the jury to understand "... that it was proper for them to consider, as a separate element of damages, independent and distinct from mental suffering, the plaintiff's past and future deprivation of the freedom of action and social intercourse with her friends. . . ."

73. See C. McCORMICK, *DAMAGES* § 86, at 303-04 (1935); *Borcharding v. Eklund*, 156 Neb. 196, 55 N.W.2d 643, 650 (1952):

In an action for damages for personal injuries which are permanent and have impaired the earning capacity, damages for pecuniary loss by reason of decreased earning power are to be based on life expectancy immediately before the injury and for future mental and physical suffering on probable expectancy of life in plaintiff's injured condition.

See also *Dark v. Brinkman*, 136 So. 2d 463 (La. App. 1962); *Webb v. Omaha & S.I. Ry.*, 101 Neb. 596, 164 N.W. 564 (1917).

74. See Kahn-Freund, *Expectation of Happiness*, 5 Mod. L. Rev. 81 (1941).

the content of human existence. The difference, if difference there be, lies not in the system of calculation employed by the two juries, but only in the units of measurement which each is expected to manipulate. The American jury must measure "*partial* loss of the good of life over the *normal* period of life . . . [whereas the English jury must measure] . . . *total* loss of the good of life over *part* of the normal period of life."⁷⁵ The knowledge, experience, common sense or intuition which is brought to bear in solving the first equation is no different from that which is requisite for solving the second.

An American court which is really convinced of the worthiness of a cause of action for the shortening of life could achieve the desired result of independent compensation within this established body of precedent by the simple expedient of varying a small segment of its charge to the jury. In a proper case, the court need only instruct the jury that in estimating the loss of enjoyment of life occasioned by the injury, it must stretch its deliberations to cover the period of the lost years, during which a *total* loss of enjoyment will have been sustained. Precise accuracy in the result need not be contemplated:

Perfection or infallibility in this regard has never been required by the profession. Such precision is not even required from appellate courts when dealing with excessive verdicts. In such cases [they] reduce the verdict if sufficiently excessive to shock the conscience of the court and [they] reduce it to the extent where it will not shock [their] conscience to permit it to stand.⁷⁶

It must, therefore, be assumed that in failing to adopt this simple expedient, in summoning up instead the spectre of undue speculation, our courts are expressing doubt not about whether the calculation *can* be made, but about whether it *ought* to be made.

If still further evidence is required to demonstrate that the true source of judicial opposition lies elsewhere than in the fear of speculation, it is conclusively furnished by the manner in which these same American courts permit compensation for the loss of earning capacity. Here, the jury is instructed to base its calculations on the plaintiff's normal life expectancy at the time of the injury, rather than his life expectancy at the time of the trial,⁷⁷ so that, if this *were* a case involving diminution of life span, recovery *could* be had for the loss of earning capacity sustained during the years never to be lived. Moreover, lest it be contended that the degree of speculation involved in appraising probable loss of future earnings is minimal because the plaintiff's pre-injury earnings provide a solid point of reference, it need only be pointed out that recovery for loss of earning capacity is possible even where it is shown that the plaintiff is actually earning

75. *Rose v. Ford*, [1937] A.C. 826, 859 (emphasis added).

76. *Hogan v. Santa Fe Trail Transp. Co.*, 148 Kan. 720, 85 P.2d 28, 35 (1938).

77. See *Prairie Creek Coal Mining Co. v. Kittrell*, 106 Ark. 138, 153 S.W. 89 (1912); *Borcherding v. Eklund*, 156 Neb. 196, 55 N.W.2d 643 (1952); C. McCORMICK, DAMAGES § 86, at 303-04 (1935); Comment, *The Measure of Damages for a Shortened Life*, 22 U. CHI. L. REV. 505 (1955).

more money after the accident than before.⁷⁸ Here, too, the jury must scan the future, with its inevitable crests and hollows, not merely of the individual plaintiff, but of the industrial society in which he will, presumably, find himself handicapped, and, with perspicacity, predict his losses.

Indeed, in the recent case of *Downie v. United States Lines Co.*,⁷⁹ the Court of Appeals for the Third Circuit surmounted the fear of speculative damages and apparently authorized independent recovery for curtailment of life expectancy. While the court rejected plaintiff's argument that loss of life expectancy is *per se* compensable, because the damages under a *per se* theory would be too speculative, it concluded that damages for curtailment of life expectancy could be awarded if they were based on "measurable components of injury."⁸⁰ The court reasoned that since a shortened life expectancy is a kind of "permanent disability," the traditional rules for the calculation of other permanent disabilities, such as the loss of a limb, could be applied to compensate a plaintiff whose expected life span is tortiously curtailed. In such a case, the jury would be instructed as to the factors it may consider in computing damages, such as the "inability to dance, bowl, swim or engage in . . . the usual family activities."⁸¹ Under this approach, the jury calculates each component separately and then combines the results to reach the total award. Unlike the "loss of enjoyment" standard, the *Downie* rule apparently measures the total loss of the enjoyment of life, calculated by adding the measurable components, over the years which the plaintiff has lost as a result of the defendant's tortious conduct.⁸²

A second basis of judicial resistance to independent compensation for loss of life expectancy is the pervasive fear of duplication of

78. See, e.g., *Tullos v. Corley*, 337 F.2d 884 (6th Cir. 1964) (plaintiff earning \$3.50 more per week after the accident than before); *Bochar v. J.B. Martin Motors, Inc.*, 374 Pa. 240, 97 A.2d 813, 815 (1953): "Parity of wages . . . standing alone . . . is inconclusive. . . . It is not the status of the immediate present which determines capacity for remunerative employment. Where permanent injury is involved, the whole span of life must be considered. Has the economic horizon . . . been shortened . . .?"

79. 359 F.2d 344 (3d Cir.), *cert. denied*, 385 U.S. 897 (1966). The plaintiff in *Downie*, a fifty-two year old seaman, suffered a heart attack aboard the defendant's vessel, which was in port. The pharmacist's mate, aware of plaintiff's symptoms, negligently permitted him to move about the ship and then instructed him to seek treatment at a hospital approximately one mile away. The exertion from plaintiff's walk to the hospital seriously aggravated plaintiff's heart condition. As a result, his normal life expectancy of eighteen years, already reduced to approximately twelve years by the heart attack, was further shortened to about eight years. The plaintiff brought an action for damages under the Jones Act, 46 U.S.C. § 668 (1964), for the negligent aggravation of his heart ailment and the consequent curtailment of his life expectancy. Although the jury indicated that \$25,000 of the total award granted to plaintiff represented a special award for prospective loss of life, the trial judge eliminated that amount from the damages awarded to plaintiff. The Court of Appeals for the Third Circuit reversed the trial court decision and remanded for a new trial on the issue of damages, holding that an award for curtailment of life expectancy, based on measurable components of damages, was permissible.

80. 359 F.2d at 347.

81. *Id.* at 347 n.3.

82. Chief Judge Kalodner, in dissent, suggested that adherence to this view would produce a rash of appeals based upon the trial judge's failure to include all of the myriad "measurable components" in his charge. In lieu of this fragmented approach he advocated submission of the issue of shortened life span to the jury as a separate element of damages, with a separate ascertainable value. *Id.* at 348.

damages. While a separate recovery for the lost years is denied by American courts, evidence of curtailment of life is almost always admissible as bearing on the severity of the injury and on the degree of mental suffering occasioned thereby.⁸³ In *Rhone v. Fisher*,⁸⁴ the Maryland Court of Appeals, while declining to adopt the British rule, upheld the following typical charge by the trial judge:

[Y]ou may not consider as an element of damage the probable loss in years of life. . . . [T]he law does not permit any recovery for any such foreshortened life expectancy, if there be any. You may, however, consider this evidence in determining the seriousness of the injury and the consequent pain and suffering and the mental anguish, if any, to which the plaintiff has been and will be subjected in the future.⁸⁵

As a backward glance at the discussion of the British difficulty with the *Slater v. Spreag* rationale will reveal,⁸⁶ loss of life and mental anguish in contemplation of such loss are two separate injuries, logically as distinct as the loss of a limb and the mental anguish resulting therefrom. If the curtailment of life span is being considered for independent recovery, a similar distinction, between the curtailment itself and the mental anguish resulting therefrom, can be readily pressed on the jury's attention in the course of remarks from the bench in order to defeat inflation of the award for mental anguish where awareness of loss is lacking. As a practical matter, it is disquieting to conceive of the rendering of inconsistent verdicts in equally meritorious cases where the force of circumstances has blunted or withheld awareness from one plaintiff, in all likelihood a child, but not from the other. Nevertheless, assuming the avoidance of double damages to be a commendable aim, the logical distinction must be made.

The fear of duplication begins to acquire more substance, however, when it is recalled that evidence of curtailment of life bears directly on the nature and extent of the injury. A jury, having once been exposed to so dramatic a revelation as that of premature death, is scarcely likely to forget it. Even more remote is the possibility that the jury will be able successfully to segregate evidence of the lost years from evidence of the gravity of the injury in order to "save" the former for compensation under a separate category. In truth, there appears to be no logically compelling reason for the jury to do so. Jurists and laymen can agree that an injury which takes ten years from a man's life is simply a more serious injury than one which leaves his life span intact. If the jury's instinctive reaction to this evidence is reinforced by overt instruction from the bench to consider it in appraising the extent of the injury, then this evidence will doubtless be reflected in the sum awarded. What then would be the effect of requiring the jury to show separately what it had awarded for the lost amenities of life? One forceful advocate of independent recognition

83. See, e.g., *Richmond Gas Co. v. Baker*, 146 Ind. 600, 45 N.E. 1049 (1897).

84. 224 Md. 223, 167 A.2d 773 (1961).

85. *Id.* at 225, 167 A.2d at 775.

86. See note 17 *supra* and accompanying text.

of lost life expectancy damages has suggested that the only result would be to expose the jury's arithmetic to the scrutiny of the court:

Once in, such evidence becomes one of those indeterminate factors which operate, *sub rosa*, to inflate awards unpredictably. By recognizing wrongful shortening of life expectancy as a separate element of damages, a covertly compensated factor may be catalogued and subjected to judicial control in respect to the inadequacy or excessiveness of damages actually being allowed for it.⁸⁷

There is, admittedly, a degree of cogency to this argument. Against it, however, must be juxtaposed the following not unlikely possibility: the jury has awarded a reasonable sum for the physical injury sustained, which reflects the fact that this injury will hasten the plaintiff's death. The jury is then asked to consider separately what the plaintiff has lost by having these years torn from his life. It considers both the number of years involved and its own objective appraisal of their content, and, again, arrives at a conservative sum. The trial judge suspects that the same evidence has influenced the recovery under each category, but as neither sum is shockingly excessive, he declines to interfere. The appellate court likewise applies the rule of conscience⁸⁸ and affirms. The defendant has paid twice over, but on a record sufficiently tidy to delight the soul of an accountant. The possibility of precisely such occurrences has seemed sufficiently imminent to American judges to foster their continuing resistance to the rule of independent recovery.

The British have displayed only minimal apprehension over the possibility of this type of duplication,⁸⁹ probably because of the low ceiling imposed by the *Benham* case, and subsequent British decisions, on damages for curtailment of life expectancy. Instead, because so many of the actions involving shortening of life have been brought, not by the living victim himself, but by his personal representative, what has concerned British courts has been the possibility of a two-fold recovery for this item, once under the survival statute and then again in a claim for wrongful death. Theoretically, such double recovery is impossible.⁹⁰ There has been a strict differentiation of the types of losses compensable in each type of suit; Lord Campbell's Act allocated to the dependents *only* such pecuniary losses as they sustained by virtue of the death. The intangible loss of the right to go on living was allocated to the estate. Yet, in the usual case, the heirs and the dependents are likely to be the same individuals, so that any financial gain to the estate is available for the benefit of the dependents. Figura-

87. Smith, *Psychic Interest in Continuation of One's Own Life: Legal Recognition and Protection*, 98 U. PA. L. REV. 781, 822 (1950).

88. See *Hogan v. Santa Fe Trail Transp. Co.*, 148 Kan. 720, 85 P.2d 28, 35 (1938) (dissent).

89. See, e.g., *Flint v. Lovell*, [1935] 1 K.B. 354, 368: "A further difficulty of application is this, that it seems to me extremely hard to avoid the danger of giving a plaintiff compensation for the same thing more than once under various heads of damage."

90. See *Farrington v. Stoddard*, 115 F.2d 96 (1st Cir. 1940).

tively, the money has been paid into the same pocket.⁹¹ Ignoring the outraged theorists and bent on a stolidly practical performance, the British have solved this dilemma by providing that any recovery obtained under the survival statute is to be deducted from the award which is given in the wrongful death action.⁹²

CONCLUSION

What, then, should be extracted from this British adventure, which has helped nourish the reluctance of our own judiciary to accord independent recovery for the loss of a part of a man's future? We need not re-enact the British drama step by step from the beginning; we can begin where they left off. It should be taken as established that curtailment of life is, short of "death on the instant," the most grievous of all possible injuries, and that a system which permits recovery for loss of fecundity but denies it for premature death can lay no claim to rational consistency. Attention should be focused exclusively on the appropriate *means* for achieving just and adequate compensation.

If we choose to compensate loss of life expectancy overtly and separately, we have the means within easy reach. In practice, we are already making partial compensation for the lost years by including them in the period for which loss of earning capacity is calculated. This, however, leaves uncompensated the intangible, non-pecuniary aspects of the injury. To grant redress for these, we need only turn to the existing category of "loss of enjoyment." By interpreting this concept flexibly and, in appropriate cases, reading into it a certain element of objective loss, we can stretch it to accommodate even a child's lack of total awareness of the extent of his injury. We need then only expand the period of measurement currently used in evaluating "loss of enjoyment" damages to include the span of the lost expectancy. The "loss of enjoyment" approach, applied to curtailment of life span, seeks to measure damages by considering loss of life span as a whole, independent of the specific components of loss. Because of the obvious danger of speculative damages under such an approach, American courts, like their British counterparts, may be tempted to place an arbitrary ceiling on such awards, thus reducing the computation of damages for loss of life expectancy to a mechanical level. Such an eventuality could, perhaps, be avoided by adopting the "sum of the measurable components" approach espoused in the *Downie* case.

Under either approach, however, courts will run the risk of duplication of damages, since the evidence of curtailment of life will undoubtedly have influenced the jury's deliberations on the seriousness of the injury and inflated its award. In addition, to base damages for "loss of enjoyment" on pre-injury life expectancy is to blur even further the distinction between the civil and the criminal law.⁹³ "Loss

91. See, e.g., *Feay v. Barnwell*, [1938] 1 All E.R. 31, 36 (K.B.): "It seems to me clear that, as the estate of the widow is, by reason of my judgment, £600 better off than it otherwise would have been, and that amount goes to the benefit of the husband, I must make allowance for it. . . ."

92. *Id.*

93. See Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 228 (1953).

of enjoyment" is apparently viewed as a species of mental suffering. The rationale of present practice in this regard is essentially compensatory; the jury is to furnish a *solatium* to ease the burden of the plaintiff's remaining life insofar as it is possible to do so with money. What purpose, however, is served by awarding a sum for loss of enjoyment in the years never to be lived? Where the victim is still alive at the time of the trial, it may be argued with some justification that, as the loss to him is a real one, the additional sum awarded will simply provide additional solace. Where, however, the action is by the executor or administrator under the survival statute, the money will actually be paid to people who have personally suffered no such loss except in abstract theory.⁹⁴ Only a desire to punish the wrongdoer by making it as expensive for him to kill as to injure could justify the granting of such recoveries. It must, therefore, be remembered that, since death merely renders certain that which was open to some doubt while the victim remained alive, namely, the actual amount of life expectancy lost by the deceased, to accord independent recovery for this item would have the effect of making it a standard item of damages in every suit brought under the survival statute. That is, in a large percentage of the cases, damages independently awarded for loss of life will have been transmuted into something startlingly resembling punitive or exemplary damages. While the punitive element often enters into the consideration of negligence damages as a matter of practice, this seems, at best, a rather dubious end for such a lofty ideal.

As to the living plaintiff, it is inconceivable that, having suffered injury serious enough to have shortened his life, he will be turned away empty-handed. The controversy raging around him is not whether he will collect anything at all, but only whether he will collect enough. For all the spiralling rhetoric, the question of compensation for the diminution of life expectancy is nothing but a question of the adequacy of jury awards in personal injury cases. The notoriously large recoveries of recent years would seem to indicate that plaintiffs' rights have been, hitherto, adequately, if sometimes covertly, safeguarded. Nevertheless, when it is the injured party who stands at the bar, and not his personal representative, the risk of duplication, minimized as much as possible by the charge, should be run, and the jury instructed to award damages for curtailment of life span based on the period of his pre-injury life expectancy. Only consistency, not justice, would argue for similar treatment in the survival suit. It is doubtful justice that "the satisfaction of the theorists' desire for elegant jurisprudence should . . . be purchased with other people's money."⁹⁵

Gloria Belgrad

94. See, e.g., *Yorkshire Electricity Bd. v. Naylor*, [1967] 2 All E.R. 1, 12 (H.L.): The law has endeavored to avoid two results, both of which it considered would be undesirable. The one is that a wrongdoer should have to pay large sums for disabling and nothing at all for killing; the other is that the large sum appropriate to total disablement should come as a windfall to the beneficiaries of the victim's estate.

95. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 226 (1953).